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I. Introduction

> Every man, and every body of men on earth, possesses the righ[t] of self-government: they receive it with their being from the hand of nature. Individuals exercise it by their single will: collections of men, by that of their majority; *for the law of the majority is the natural law of every society of men.*[1]

Thomas Jefferson recognized the principle of majority rule more than 200 years ago — a principle that has governed our representative bodies since before the founding of the nation, with only a few well-delineated exceptions.[2] On January 4, 1995, the U.S. House of Representatives departed from the ancient practice of majority rule when it adopted House Rule XXI, requiring three-fifths of the voting members to approve income tax increases.[3] In approving this rule, the House relied on its constitutionally delegated power to "determine the Rules of its Proceedings . . . ."[4]

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1. 17 THE PAPERS OF THOMAS JEFFERSON 95 (Julian P. Boyd ed., 1965) (emphasis added).

2. *See infra* note 32 (listing exceptions to majority rule).

3. H.R. Res. 6, 104th Cong., 1st Sess. § 106 (1995) (enacted as House Rule XXI(5)(c) and (d)). House Rule XXI(5) reads in significant part:

> (c) No bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase shall be considered passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting.

Id.

4. U.S. CONST. art. I, § 5, cl. 2.

Slightly more than one month after the adoption of Rule XXI, a number of representatives, together with individual voters, filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment that House Rule XXI is unconstitutional on its face.[5] On August 23, 1995, Judge Thomas Pennfield Jackson granted the defendant's motion to dismiss the complaint on the grounds that the suit was barred by the doctrine of equitable or remedial discretion.[6]

This case raises a number of significant constitutional and prudential issues. The plaintiffs called upon the court to consider the doctrine of separation of powers in determining its proper role in reviewing internal procedures of the legislature. Moreover, the plaintiffs' claim brought to a head the explicit constitutional authority of each House to enact its own rules of procedure with the unwritten principle of majority rule.

Before a court will address the merits of claims that challenge procedural legislative rules, the party contesting the rule must demonstrate to the court that he or she has standing to sue, that the issue is ripe for consideration, and that the issue is not barred by the political question doctrine. In order to succeed, the party must convince the court that the judiciary should enmesh itself in the internal operations of legislative procedure. The judiciary traditionally has been hesitant to grant relief to parties when doing so requires the courts to police the internal operations of a coequal branch of government. The notion of standing under Article III of the Constitution, and the ripeness and political question doctrines,

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5. *See* Complaint at 12, Skaggs v. Carle, 898 F. Supp. 1 (D.D.C. 1995) (No. 1:95CV002-51) [hereinafter Complaint]. In a second count, the *Skaggs* complaint challenged House Rule XXI(5)(d), which prohibits the passage of retroactive federal income tax increases. *Id.* at 11. In essence, the claim was that the House has the power under Article I, Section 8, and the Sixteenth Amendment to the U.S. Constitution to enact retroactive income tax increases. *Id.* at 11; *see also* United States v. Carlton, 114 S. Ct. 2018 (1994) (upholding Congress's power to enact retroactive income tax increases). The plaintiffs claimed that House Rule XXI(5)(d) prohibits the House from exercising one of its constitutionally delegated powers. Complaint, *supra*, at 12. It is unclear from the complaint what constitutional principle the plaintiffs alleged was violated. A full analysis of this provision is beyond the scope of this Article. For a discussion of the constitutionality of retroactive income tax increases and the ability of Congress to alter that power, see *Carlton*, 114 S. Ct. at 2021-24; *see also* Pat Castellano, Comment, *Retroactively Taxing Done Deals: Are There Limits?*, 43 KAN. L. REV. 417 (1995); Andrew G. Schultz, Note, *Graveyard Robbery in the Omnibus Reconciliation Act of 1993: A Modern Look at the Constitutionality of Retroactive Taxes*, 27 J. MARSHALL L. REV. 775 (1994).

6. Skaggs v. Carle, 898 F. Supp. 1 (D.D.C. 1995), *appeal docketed*, No. 95-5323 (D.C. Cir. Sept. 1995). For a discussion of the doctrine of equitable discretion, see *infra* part III.B.

serve to restrain the federal judiciary from encroaching on the operations of the other branches of the federal government.[7] In the present case, the hesitancy of the judiciary to intrude on the operations of the legislature proved to be an insurmountable obstacle to the success of the plaintiffs' suit.[8]

Despite a passing reference to the merits of the plaintiffs' claim,[9] the *Skaggs* court found itself to be an inappropriate forum for settling disputes over the constitutionality of legislative procedure. The court's refusal to consider the merits of a claim that House Rule XXI violates the Constituton, however, should not be construed to undermine the importance of the constitutional concept of majority rule. On the contrary, the principle of majority rule was clearly, though implicitly, present throughout the debates in 1787.[10] The Framers were extremely concerned about subjecting the will of the majority to the tyranny of the minority. They established in the Constitution a few well-delineated exceptions to majority rule, arguably leaving all other issues to be determined by a majority of the quorum. While a number of parliamentary procedures, including the committee system, cloture, and suspension of the rules have antimajoritarian elements, each can be defended on the grounds that it is intended to preserve orderly debate and consideration of legislation. The adoption of House Rule XXI represents the first time that the House of Representatives has made a normative judgment that a particular class of legislation is undesirable and made passing that legislation more difficult by requiring a supermajority to approve the final passage of a bill.

Part II of this Article will probe the debates of the Constitutional Convention of 1787 and the writings of the Framers of the Constitution in order to determine their view of the propriety of supermajority provisions. This part will also analyze the sparse case law in this area following the view the courts have taken regarding supermajority provisions. Part II will illustrate that supermajority provisions like House Rule XXI are of questionable constitutionality. Part III will demonstrate that even if the three-fifths tax rule is constitutionally flawed, the judiciary should not

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7. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-10, 3-13, 3-14 to 3-21 (2d ed. 1988) (discussing doctrines of ripeness, political question, and standing).

8. *See Skaggs*, 898 F. Supp. at 2.

9. *See id.* at 3.

10. *See infra* part II.A.

attempt to rectify the situation because it will never be able to extricate itself from the quagmire of policing legislative rules that impinge upon majority rule. Part III will also analyze the concepts of standing, equitable or remedial discretion, and the political question doctrine, and lay out their rationales and applications to House Rule XXI. This analysis will demonstrate that, when weighing the balance between the competing constitutional principles of separation of powers and majority rule, the danger to a meaningful separation of powers between the judiciary and the legislature is far greater than any danger posed by provisions like the three-fifths tax rule.

II. The Constitutionality of Supermajority Provisions

The conclusion that a challenge to Rule XXI poses a nonjusticiable issue should not foreclose consideration of the merits of the claim that Rule XXI violates a majority rule concept in the Constitution. The fact that a matter is nonjusticable does not mean that the Constitution has not been violated; it means only that the judiciary is not the appropriate forum for deciding the merits of the constitutional claim.[11] In certain situations, one or the other of the political branches may be the only proper forum for deciding the application of constitutional principles.[12] If or when House Rule XXI or a similar legislative rule is adopted by a future Congress, that body will be responsible for deciding the merits of a constitutional challenge to such a supermajority rule.

A. The Framers' Intent

Beginning an analysis of House Rule XXI by attempting to determine the intent of the Framers of the U.S. Constitution is appropriate for two reasons. First, original intent is a lodestar by which courts guide their determination of constitutional questions. Requiring courts to probe the intent of the Framers restricts their ability to superimpose their own notions of the propriety of the legislative act on the Constitution.[13] Second, the U.S. Constitution

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11. *See* Gregory Frederick Van Tatenhove, Comment, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597, 626 & n.145 (1987-1988).

12. *E.g.*, United States v. Nixon, 506 U.S. 224, 235-36 (1993) (concluding that the Senate has the sole power to try impeachments, and the determination of whether particular impeachment proceedings are consistent with that power lies with the Senate).

13. *See* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 13-14 (1987) (noting that the Founders feared judicial discretion and that original intent limits that discretion);

is a social compact into which the Framers built the ability to modify its provisions through amendment.[14] James Madison wrote, "[If] the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding the Constitution there can be no security for a consistent and stable, more than for a faithful, exercise of its powers."[15] If judges are free to alter, add to, or subtract from the provisions of the Constitution, it is no longer an instrument that has been subjected to intense consideration and long debate by direct representatives of the people.[16] Instead, it will embody the will of a small number of unelected, unaccountable judges. Regardless of the general merits of originalism, an analysis of the Framers' intent with regard to House Rule XXI is appropriate because few other sources of authority are available from which to determine whether the Constitution embodies the principle of majority rule.

Having established the relevance of considering the Framers' intent, the central issue becomes whether the explicit power of each House to "determine the Rules of its Proceedings,"[17] is limited by some explicit or implicit provision of the Constitution. Admittedly, the Constitution does not expressly state that, except as otherwise provided, only a majority (that is, more than fifty percent) of the

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ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143-85 (1990). *But see generally* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988) (criticizing original intent as an approach to constitutional interpretation); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

14. *See* U.S. CONST. art. V; *see also* BERGER, *supra* note 13, at 14-15, 173-91 (noting that Article V provides power to amend the Constitution, but failure to rely on original intent shifts that power to judiciary); BORK, *supra* note 13, at 171 (noting that the Constitution provides a mechanism for amendment, which should be used rather than defaulting to an unelected judiciary).

15. 9 THE WRITINGS OF JAMES MADISON 191 (Gaillard Hunt ed., 1910); *see also* Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J. L. & PUB. POL'Y 5, 9 (1988) (reasoning that "only a written constitution with a fixed meaning could be relied upon to limit the arbitrary exercise of governmental power"); *id.* at 11 ("The Framers would have seen no point in drafting constitutional provisions if the courts did not then interpret those written provisions in the same manner as they would interpret any other written legal document, such as a statute, a contract, or a will.").

16. *See* BERGER, *supra* note 13, at 8-9; Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 288-89 (1988); Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 24 (1985).

17. U.S. CONST. art. I, § 5, cl. 2.

quorum[18] is necessary to pass legislation.[19] The Constitution reads only: "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States . . . ."[20] The term "Concurrence" is clearly not synonymous with majority because it is used elsewhere in the Constitution in reference to supermajority provisions.[21] Arguably, because the Framers explicitly required a majority, or even a supermajority, when they deemed it necessary, the lack of an explicit majority rule provision in the Constitution

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18. The Constitution requires that "a Majority of each [House] shall constitute a Quorum to do Business." U.S. CONST. art. I, § 5, cl. 1.

19. In fact, the term "majority" is only used four times in the Constitution. The first reference appears in Article I, Section 5, Clause 1, and relates to the number of representatives necessary to convene each House of Congress. *See supra* note 18. The Twelfth Amendment uses the term a second time in reference to the election of the President. U.S. CONST. amend. XII. The third reference appears in the Twenty-fifth Amendment, relating to succession to presidency and vice presidency. That provision reads: "Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress." *Id.* amend. XXV, § 2. The term is used a fourth time in the fourth section of the Twenty-fifth Amendment which relates to declaring the President unable to discharge the duties of his office. *Id.* amend. XXV, § 4.

20. U.S. CONST. art. I, § 7, cl. 3; *see id.* cl. 2 ("Every Bill which shall have passed the House of Representatives and Senate shall, before it becomes a Law, be presented to the President of the United States . . . .").

21. In reference to impeachment the Constitution reads: "[N]o Person shall be convicted without the Concurrence of two thirds of the Members present." U.S. CONST. art. I, § 3, cl. 6. It appears that the Framers understood the term "concurrence" to mean a "combination in effecting any purpose or end, or in doing any work; co-operation of agents or causes . . . Accordance, agreement, assent, consent." 3 THE OXFORD ENGLISH DICTIONARY 676 (2d ed. 1989) (defining "concurrence" and tracking historical understanding of that term); THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1780) (defining concur as "[t]o meet in one point; to agree, to join in one action; to be united with, to be conjoined; to contribute to one common event"; and concurrence as "[u]nion, association, conjunction; combination of many agents or circumstances; assistance, help; joint right, common claim.").

The requirement that a bill have "passed" the House and Senate may provide more concrete evidence that the Framers explicitly included the majority rule principle in the Constitution. *See* U.S. CONST. art. I, § 7, cl. 2. Some definitions of the term "pass" include the concept of majority rule. *See* 2 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 935, § 4 (1883) ("When a legislative bill is finally assented to by a majority vote of the body having its enactment in consideration, it is said to be 'passed' by such body . . . ."). Other definitions, however, define the term "pass" more generally without reference to the majority rule. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1649 (1961) ("to secure the allowance or approval of a legislature or other body that has power to sanction or reject a bill or proposal"); SHERIDAN, *supra* ("to enact a law").

leaves the determination of the appropriate number of votes necessary to pass legislation to the Congress.[22]

In *United States v. Ballin*[23] the Supreme Court recognized the fairly broad power of Congress to adopt rules of procedure. The *Ballin* Court evaluated the constitutionality of a House rule that established the procedure for determining whether a quorum was present so that the House could conduct business.[24] The House rule at issue allowed the Clerk of the House to record the names of those members who were physically present even if they did not answer the quorum call.[25] The Supreme Court held that because the Constitution established no method for determining whether a majority is present, it is "within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact."[26] The Court reasoned that "it is no impeachment of the rule to say that some other way would be better, more accurate or even more just."[27]

Given this background and the Constitution's failure to define either the percentage of members necessary to pass legislation, or the term "concurrence," Congress arguably has the power to adopt rules of procedure requiring a supermajority to pass legislation. Upon closer examination, however, this argument fails. The Supreme Court in *Ballin* specifically recognized that Congress's power to adopt rules of procedure under its Article I, Section 5 power is limited. The Court held, "[Each house] may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."[28] The appropriate inquiry, therefore, is whether House Rule XXI ignores some constitutional restraints or violates some fundamental rights.[29]

While the principle of majority rule is not explicitly stated in the Constitution, certain principles are so inherent in the text and

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22. *See* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 486-87 (1995).

23. 144 U.S. 1 (1892).

24. *Id.* at 4-6; *see also* U.S. CONST. art. I, § 5, cl. 1 (requiring majority of each House to constitute quorum).

25. *Ballin*, 144 U.S. at 5 (reprinting House Rule XV).

26. *Id.* at 6.

27. *Id.* at 5.

28. *Id.*

29. *Id.*

history of the Constitution that the Framers did not need to make them explicit.[30] For example, pointing to any single provision of the Constitution that spells out the doctrine of federalism is impossible. Nonetheless, the notion of federalism is found in the interplay between constitutional provisions, the text of the Tenth Amendment, the historical role of the states, and the debates and writings of the Framers.[31] Similarly, the principle of majority rule is so fundamental that the Framers found it unnecessary to explicitly enunciate it in the Constitution.

The Constitution explicitly provides for a number of situations that require a deviation from the principle of majority rule in order for the legislature to take action.[32] When the delegates at the Constitutional Convention considered a supermajority provision, they debated the benefits of majority rule and determined that in certain limited situations, a supermajority was necessary to prevent rash decisions. The interchange between James Madison and

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30. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1239-45 (1995). Professor Tribe provides a number of excellent examples of words that necessarily must be interpreted as being part of the Constitution despite the fact that they are not found explicitly in the text.

> A word frequently omitted from the federal Constitution but often understood to be silently there is the word "federal" itself. Although the Sixth Amendment provides for a speedy jury trial, right to counsel, and other protections "in *all* criminal prosecutions," we know as a matter of structure and history that these Sixth Amendment protections applied only to *federal* criminal prosecutions (until the Fourteenth Amendment and incorporation doctrine came along). Similarly, the guarantee of the writ of habeas corpus and the bans on bills of attainder and ex post facto laws in section 9 of Article I apply only to the federal government, as is clear — despite the absence of any express indication in section 9 — from section 10's analogous prohibition on *state* bills of attainder and ex post facto laws (but not on suspensions of the writ of habeas corpus).

Id. at 1239-40 (footnotes omitted).

31. *See* BERGER, *supra* note 13, at 15. *See generally* Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701 (1995) (arguing that temporary executive immunity is implicit from the text and history of the Constitution despite the fact that it is not mentioned in the document).

32. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2 (giving the President power to make treaties with the concurrence of two-thirds of Senate); *id.* art. I, § 3, cl. 6 (requiring two-thirds of Senate to convict President after impeachment by House); *id.* art. I, § 5, cl. 2 (requiring two-thirds of House to expel Member); *id.* art. I, § 5, cl. 3 (allowing one-fifth of House to compel recordation of yeas and nays); *id.* art. I, § 7, cl. 3 (requiring two-thirds of each House to override presidential veto); *id.* art. V (requiring two-thirds of each House to approve proposed Amendments to Constitution); *id.* amend. XIV, § 3 (requiring two-thirds of Congress to remove disability of person engaged in rebellion); *id.* amend. XXV, § 4 (requiring two-thirds of Congress to confirm that President is disabled).

Gouverneur Morris concerning the requirement of a concurrence of two-thirds to expel a member illustrates the debate over the propriety of supermajority requirements:

> Mr. Madison observed that the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused. He moved that "with the concurrence of 2/3" might be inserted between may & expel.
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> . . .
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> Mr. Gov'r Morris. This power may be safely trusted to a majority. To require more may produce abuses on the side of the minority. A few men from factious motives may keep in a member who ought to be expelled.[33]

A similar dialogue occurred when the delegates debated the requirement that two-thirds of the Senate was necessary to ratify a treaty. The delegates considered a number of different options. James Wilson of Pennsylvania moved to strike the two-thirds requirement stating, "If the majority cannot be trusted, it was a proof . . . that we were not fit for one Society."[34] The delegates rejected the idea of striking the two-thirds requirement by a vote of 9-1, with Connecticut divided.[35] As another option, Roger Sherman of Connecticut recommended substituting the two-thirds provision with a requirement that treaties be approved by a majority of the whole Senate.[36] Hugh Williamson of North Carolina opposed the motion, claiming that it would provide less protection than the two-thirds requirement.[37] The motion was defeated by a vote of 6-5.[38]

The records of the Convention amply illustrate that the Framers understood the dangers of allowing a minority to obstruct the will of the majority. The delegates rejected repeated efforts to impose sweeping supermajority requirements in favor of a simple-majority rule.[39] Moreover, the Framers were careful to limit the

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33. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 431 (Ohio University Press, Bicentennial ed., 1987). The measure was ultimately approved by ten states with Pennsylvania divided. *Id.*

34. *Id.* at 602.

35. *Id.* at 603.

36. *Id.* at 604.

37. *Id.*

38. MADISON, *supra* note 33, at 604.

39. *See id.* at 81 (statement of Hugh Williamson), 100-01, 144, 220-21, 546-54; 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 554 (Max Farrand ed., 1987)

use of supermajority requirements to a few special cases, which they felt merited special consideration.

Another structural provision of the Constitution supports the idea that the Framers intended majority rule to govern in all situations besides those specifically enumerated. Article I, Section 3 allows the Vice President, as President of the Senate, to cast the deciding vote only if the Senate is equally divided.[40] The debate at the Constitutional Convention on the position of the Vice President is sparse.[41] Alexander Hamilton, in *Federalist 68*, defended the Vice President's ability to cast the deciding vote as necessary "to secure at all times the possibility of a definitive resolution of the body."[42] This evidence on the role of the Vice President tends to support the conclusion that the Framers foresaw that a single vote margin in the Senate (the Vice President's) would be sufficient to represent the final decision of the Senate.

Since a single vote majority could control a decision of the Senate, there is no reason to believe that the Framers intended that a different rule would govern the House of Representatives.[43] If the Senate were to follow the House's lead and impose supermajority requirements for passing legislation, it could effectively eliminate the constitutional role of the Vice President in casting the deciding vote in situations when the Senate is equally divided.[44]

Although this evidence supports the notion that majority rule is a constitutional norm with which the House cannot interfere, other contemporary writings (especially the *Federalist Papers*) lend even stronger support to the principle of majority rule. Although Thomas Jefferson was not a member of the Constitutional

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[hereinafter RECORDS OF THE FEDERAL CONVENTION]; 2 *id.* at 135-36; 3 *id.* at 110.

40. U.S. CONST. art. I, § 3, cl. 4.

41. *See* MADISON, *supra* note 33, at 575-76, 593, 596.

42. THE FEDERALIST No. 68, at 395 (Alexander Hamilton) (Isaac Kramnick ed., 1987); *see also* MADISON, *supra* note 33, at 596 (statement of Roger Sherman).

43. While many differences exist between the House and the Senate, *compare* U.S. CONST. art. I, § 2 *with id.* § 3, no apparent difference exists between the process by which legislation passes the House and the Senate. The Constitution provides only that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . ." U.S. CONST. art. I, § 7, cl. 2. The Constitution also provides that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States." *Id.* § 7, cl. 3.

44. *See* Benjamin Lieber & Patrick Brown, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347, 2350 (1995). *But see* McGinnis & Rappaport, *supra* note 22, at 488-89.

Convention or even actively involved in the ratification of the Constitution, he was one of the leading parliamentary scholars of the day.[45] On the principle of majority rule, Jefferson wrote:

> The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, &c., where not otherwise expressly provided . . . . But if the House be equally divided, *semper presuamtur pro negante*; that is, the former law is not to be changed but by a majority . . . .[46]

Jefferson's passage on majority rule and his reliance on English parliamentary practice are important in understanding the framework within which the Framers operated. As Jefferson noted, the English parliamentary system "is the model which we have all studied."[47] Jefferson further observed that the English rules are "deposited, too, in publications possessed by many, and open to all."[48]

Jefferson's Manual is not the only historical evidence from which to conclude that the Framers had an intimate understanding of the meaning of majority rule and favored it. The historical background from which the development of the Constitution stemmed was the failure of the Articles of Confederation.[49] One of the major shortcomings of the Articles was the requirement that two-thirds of the states agree to most major legislation including tax measures.[50] In *Federalist 22* Alexander Hamilton commented

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45. *See* THOMAS JEFFERSON, JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE (1801) [hereinafter JEFFERSON], *reprinted in* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED THIRD CONGRESS § 283 (William Holmes Brown ed., 1993); *see also id.* § 284 (noting that "[t]he Manual is regarded by English parliamentarians as the best statement of what the law of Parliament was at the time Jefferson wrote it"). Jefferson's Manual is supported by ample authority, resting on hundreds of years of English parliamentary practice. *See id.* In fact, Jefferson's Manual still forms the basis of many House rules today. House Rule XLII, 104th Cong., 1st Sess. (1995).

46. JEFFERSON, *supra* note 45, § 508 (citations omitted).

47. *Id.* § 286.

48. *Id.*

49. *See* 1 1787 DRAFTING THE U.S. CONSTITUTION 84-157 (Wilbourn E. Benton ed., 1986) (collecting writings of Founders on weaknesses of Articles of Confederation).

50. ART. CONF. art. 9, para. 6.

> The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit or the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or

at length on the failure of supermajority requirements in the Articles of Confederation and the dangers of returning to a system requiring supermajorities for legislating.[51] Hamilton observed that any time a decision requires more than a majority, it allows the minority to impose its will on the majority.[52] He rejected the argument that requiring supermajorities would add a layer of protection against hasty decisions,[53] reasoning that the real effect of requiring more than a majority for a decision was "to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto to the regular deliberations and decisions of a respectable majority."[54] Hamilton continued:

> If a pertinacious minority can control the opinion of a majority respecting the best mode of conducting [the public business], the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good. And yet, in such a system, it is even happy when such compromises can take place: for upon some occasions things will not admit of accommodation; and then the measures of government must be injuriously suspended, or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of voters, kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy.[55]

Hamilton concluded his attack on supermajorities by weighing the benefits of such requirements against the dangers they pose:

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purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, *unless nine States assent to the same* . . . .

Id. (emphasis added). While this list covered virtually all important actions taken by the national government under the Articles of Confederation, the Articles did allow for a majority of States to make decisions in any situation not otherwise listed. *Id.* ("nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled").

51. THE FEDERALIST No. 22 (Alexander Hamilton), *supra* note 42, at 179-81.

52. *Id.* at 180 ("To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is, in its tendency, to subject the sense of the greater number to that of the lesser number.").

53. *Id.*

54. *Id.*

55. *Id.*

> When the concurrence of a large number is required by the Constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely *to be done*; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering that which is necessary from being done, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.[56]

While Hamilton's *Federalist 22* was a specific attack on the flawed two-thirds requirement in the Articles of Confederation, James Madison, in *Federalist 58*, explicitly acknowledged that the Constitutional Convention had considered requiring more than a majority of representatives to approve legislation.[57] In a vein similar to that taken by Hamilton in *Federalist 22*, Madison weighed the benefits and the drawbacks of supermajority requirements. He acknowledged that good reasons may exist for supermajority requirements:

> It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures.[58]

He concluded, however, that the drawbacks of supermajority requirements far outweigh the benefits:

> But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. *It would be no longer the majority that would rule: the power would be transferred to the minority.* Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences.[59]

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56. THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 42, at 180-81.
57. THE FEDERALIST No. 58 (James Madison), *supra* note 42, at 351-52.
58. *Id.* at 351.
59. *Id.* at 351-52 (emphasis added).

These passages provide the most compelling evidence that the Founders specifically considered and rejected supermajority requirements, except in a few well-delineated exceptions.[60]

B. Supermajorities and Case Law

Although few cases have analyzed the constitutionality of supermajority requirements, the Supreme Court recently addressed this issue in *Gordon v. Lance*.[61] In *Gordon*, the Court rejected an equal protection challenge to a provision of the West Virginia Constitution requiring sixty percent of voters in a referendum to approve bonded indebtedness and tax increases.[62] The Supreme Court reasoned that the Equal Protection Clause of the Fourteenth Amendment[63] requires that a "discrete and insular minority" be singled out for special treatment in order for a constitutional violation to occur.[64] The Court concluded that no "independently identifiable group or category" was affected by the three-fifths provision of the West Virginia Constitution.[65] Under this reading of *Gordon*, House Rule XXI similarly does not violate the equal protection component of the Fifth Amendment because it does not affect any readily discernable group.[66]

Yet even if House Rule XXI does not violate the equal protection component of the Fifth Amendment, it may still offend some other provision of the U.S. Constitution. In this way, *Gordon* is easily distinguishable when another provision of the Constitution is invoked because the West Virginia Constitution explicitly recognized the supermajority requirement for tax increases and bonded indebtedness.[67] On the other hand, the U.S. Constitution recognizes supermajority requirements in only a limited number of

60. For additional passages relating to supermajorities and the power of the minority over the majority, see, e.g., THE FEDERALIST No. 54 (James Madison), *supra* note 42, at 334; *id.* No. 62 (James Madison) at 365; *id.* No. 75 (Alexander Hamilton) at 427; Lieber & Brown, *supra* note 44, at 2350 n.15 (listing additional references from the writings of the Framers referring to majority rule).

61. 403 U.S. 1 (1971).

62. *Id.* at 6-7.

63. U.S. CONST. amend. XIV, § 1.

64. *Gordon*, 403 U.S. at 5.

65. *Id.*

66. U.S. CONST. amend. V; *see* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (recognizing concept of equal protection in Due Process Clause of Fifth Amendment).

67. W. VA. CONST. art. 8, § 4.

situations.[68] Moreover, the Supreme Court, on many occasions, has recognized that the structure of state governments does not have to mirror that of the federal government.[69] In fact, the Court has held that states are not required to incorporate integral structural features of the federal Constitution like the doctrine of separation of powers.[70] No apparent reason exists for states to be bound by majority rule even if the U.S. Constitution requires Congress to abide by majority rule in all situations except as otherwise provided.[71] Therefore, just because some state constitutions differ from the Federal Constitution by allowing passage of legislation by a supermajority, does not mean that the Federal Constitution allows Congress to impose supermajority requirements for passing legislation.

Because the Court's holding in *Gordon* is limited to the constitutionality of supermajority provisions imposed by states, it is not directly applicable to supermajority requirements imposed by Congress on the passage of federal legislation. Nevertheless, dicta in *Gordon* tends to support the position that the U.S. Constitution does not require majority rule for the passage of federal legislation, but rather allows Congress to implement supermajority requirements similar to House Rule XXI. Specifically, the Court wrote: "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue."[72] This bald assertion is not supported by any analysis of the structure of the U.S. Constitu-

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68. *See supra* note 32 (listing provisions of Constitution that explicitly require more than a majority to approve measures).

69. *See, e.g.*, Howlett v. Rose, 496 U.S. 356, 372 (1990); Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902); Missouri v. Lewis, 101 U.S. 22, 31-32 (1879).

70. *Dreyer*, 187 U.S. at 84 ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State.").

71. Jefferson recognized that states deviated from the parliamentary practice of England and the federal government. JEFFERSON, *supra* note 45, § 286. While a full analysis of supermajority requirements in the states at the time of the ratification of the Constitution is beyond the scope of this Article, it is important to observe that the Framers recognized that the parliamentary principles that governed the federal government were not necessarily the same as those in the states. Therefore, recognizing the power of the states to require supermajorities for the passage of certain legislation where the Constitution prohibits supermajorities is not inconsistent with the understanding of the Framers.

72. Gordon v. Lance, 403 U.S. 1, 6 (1971).

tion or the history of its ratification. Moreover, dicta in other cases supports a conclusion different from that reached in *Gordon*.[73]

While *United States v. Ballin*[74] does not deal specifically with the issue of majority rule, but rather with the question of what constitutes a quorum, it is perhaps the most persuasive Supreme Court authority on majority rule. The Court analyzed the following question: "[W]hat is necessary to constitute the official action of this legislative and representative body?"[75] The Court relied on a number of authorities from England and the United States that support the proposition that a vote of the majority of a quorum is sufficient to constitute an act of the legislature.[76] While neither *Ballin*, nor *Gordon*, nor any other case precedent conclusively supports majority rule as a principle of the U.S. Constitution, *Ballin*, through its reliance on abundant authority, tends to support the conclusion that the Framers intended majority rule to govern Congress in all cases except those in which the Constitution explicitly requires otherwise. It is against this principle that we must measure House Rule XXI.

C. *Application of the Constitutional Requirement of Majority Rule to House Rule XXI*

Even if the principle of majority rule exists in the Constitution, as the historical evidence discussed above indicates, House Rule

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73. *See, e.g.*, Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 955-56 n. 21 (1983) (recognizing that Article II, Section 2 requires two-thirds of Senators to approve treaties "rather than the simple majority required for passage of legislation"); United States v. Ballin, 144 U.S. 1, 6 (1892) ("[H]ere the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations.").

74. 144 U.S. 1 (1892).

75. *Id.* at 7.

76. *See id.* at 7 ("'When the assembly are *duly met* I take it to be clear law that the corporate act may be done by the majority of those who have once regularly constituted the meeting.'") (quoting Rex v. Monday, 2 Cowp. 530, 538 (K.B. 1777)); *id.* ("'a majority of those *present* when legally met will bind the rest'") (quoting 5 Dane's Abr. at 150); *id.* at 7-8 ("'a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act'") (quoting 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 283 (4th ed. c.1890)); *id.* at 8 ("'For, according to the principle of all the cases referred to, a quorum possesses all the powers of the whole body; a majority of which quorum must, of course govern. . . . The constitutions of this State and the United States declare that a majority shall be a quorum to do business; but a majority of that quorum are sufficient to decide the most important question.'") (quoting State v. Deliesseline, 12 S.C.L. (1 McCord) 52 (1821)).

XXI may not, in fact, violate the concept of majority rule. A number of arguments can be made that House Rule XXI is, indeed, consistent with the principle of majority rule. It may be argued that because House Rule XXI was adopted by majority vote,[77] and since House rules of earlier Houses are not binding on subsequent Houses,[78] House Rule XXI does not violate the majority rule principle. This reasoning is flawed, however, because the three-fifths rule is applicable to all tax legislation promulgated during the entire term of the House. If legislation requiring income tax increases came before the House for a vote, and the measure received approval from more than fifty percent of the members but less than sixty percent required by the rule, the members who vote against the three-fifths rule would have their interests defeated even if they voted in the majority for the tax increase. Hence, forty-one percent of the representatives will be able to keep fifty-nine percent from enacting all legislation pertaining to tax increases during the entire two year term of the House, thus undermining the principle of majority rule.[79]

The fact that the House can suspend or amend its rules does not save House Rule XXI from violating the majority rule principle, because these rules prevent a simple majority of the quorum who are in favor of passing an income tax increase from

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77. House Rule XXI was adopted by approximately 54% (279 to 152). *See* 141 CONG. REC. H39,001, 39,071-72 (daily ed. Jan. 4, 1995).

78. *See* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED THIRD CONGRESS § 59 (William Holmes Brown ed., 1993) [hereinafter RULES OF THE HOUSE]. Since every two years the House is considered a separate body from preceding Houses, rules of a prior House are not binding on a subsequent House. *See id.* The Senate, on the other hand, is considered a continuing body so that it does not adopt new rules, but rather its rules continue in effect. Before the adoption of new rules, the House is governed by general parliamentary procedure as found in Jefferson's Manual, *see* JEFFERSON, *supra* note 45, and revised and amended by the subsequent House precedent. RULES OF THE HOUSE, *supra*, § 60. The principle of majority rule, therefore, is controlling on the House before it adopts new rules, if not by the Constitution, at least by general parliamentary practice. *See* JEFFERSON, *supra* note 45, § 508.

79. There is also no reason to believe that supermajority rules will be limited to tax increases. *See* Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539, 1541 (1995) (noting that House Rule XXI sets precedent "for endless proliferation of supermajority requirements"). Congress may again come under control of the Democrats who may impose supermajority requirements for reducing welfare benefits, increasing defense spending, cutting taxes, or other areas of legislation. Therefore, while the three-fifths tax rule may be an attractive method of preventing tax increases, it can easily be used against the current Republican majority. This, of course, is not a constitutional argument, but rather a critique of the approach taken by the 104th Congress.

circumventing House Rule XXI. The procedure allowing the House to suspend its rules requires an even greater supermajority than House Rule XXI.[80] Two-thirds of the members voting are required in order to suspend the House rules and pass legislation.[81] Thus, enacting legislation by circumventing the House rules is more difficult than actually passing the tax increases in accordance with House Rule XXI.[82]

Likewise, House Rule XXI may not be amended to allow for the passage of tax bills by a simple majority of the quorum. Members of the House may amend rules in one of two ways. Under the first method, the Rules Committee can release a resolution to the floor seeking to amend the House rules.[83] The House Rules Committee, however, does not reflect the composition of the House as a whole.[84] Therefore, even if a majority of a quorum of the House intended to change the rules, there is no guarantee that the Rules Committee would concur and release the amendment for a floor vote.[85] Under the second method, the House is permitted to bypass the Rules Committee by discharging a rule from the Committee allowing amendment.[86] This procedure, however, requires an absolute majority of the House (that is, 218 members) instead of a majority of the quorum as normally required,[87] and consequently has proved to be extremely difficult to implement. Only two bills have been formally enacted following this discharge procedure.[88] Once the supermajority rule is in place, it is difficult to change the rule until the beginning of the following congressional term. Thus, the supermajority rule subjects

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80. House Rule XXVII, 104th Cong., 1st Sess. (1995).

81. *Id.*; *see also* CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 296-313 (1989) (describing procedure of suspension of House rules).

82. *See* Ackerman et al., *supra* note 79, at 1542 (noting that even if two-thirds of House members move to suspend certain rules, the Speaker may unilaterally refuse to recognize the motion).

83. *See id.*

84. *See id.*

85. *Id.*

86. House Rule XXVII, 104th Cong., 1st Sess. (1995); *see* TIEFER, *supra* note 81, at 314-26 (describing discharge procedure); Ackerman et al., *supra* note 79, at 1542.

87. House Rule XXVII(3), 104th Cong., 1st Sess. (1995). Normally only a majority of the quorum is necessary for the House to take action. U.S. CONST. art. I, § 5.

88. *See* TIEFER, *supra* note 81, at 326 (noting that only the Fair Labor Standards Act of 1938 and the Federal Pay Raise Act of 1960 have been enacted following formal discharge procedures). Tiefer has noted that discharge motions have been responsible for inducing the committee responsible for legislation to release it without a formal discharge procedure. *Id.*

the will of the majority to the whim of the minority so long as it remains in place.

Finally, in support of the constitutionality of House Rule XXI, advocates of the Rule may point to other antimajoritarian rules and procedures that have a long precedent in the House. In the House, a motion to suspend the rules and pass legislation requires two-thirds of the quorum,[89] and a motion to discharge a special rule requires an absolute majority.[90] In the Senate, a supermajority is required for cloture,[91] and in both Houses of Congress, the committee structure itself tends to subject the will of the majority to that of the minority.[92] Relying on other provisions of congressional rules and procedure that may violate the Constitution does not make the three-fifths rule constitutional. The existence of many other long-standing antimajoritarian rules and procedures may, however, give the judiciary pause before issuing relief.

III. Prudential Grounds for the Court To Refuse To Address a Challenge to the House Three-Fifths Rule

A legislator or private citizen seeking to challenge legislative rules must navigate a number of prudential barriers before a court will hear the case. Standing and ripeness represent two preliminary issues that must be addressed before the court will consider any challenge to a rule of legislative procedure. A third hurdle facing potential claimants is the doctrine of equitable or remedial discretion, which is applied in the District of Columbia Circuit.[93] Even if claimants challenging a legislative rule can maneuver these prudential barriers, the courts may invoke the political question doctrine as grounds for holding that the judiciary is not the proper forum for resolving their dispute.

The ability of a congressional plaintiff to use the courts to remedy a perceived harm to the legislative process has been fully

89. House Rule XXVII, 104th Cong., 1st Sess. (1995).

90. House Rule XXVII(3), 104th Cong., 1st Sess. (1995).

91. Senate Rule XXII.

92. *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1167 (D.C. Cir.) (noting the Republican argument that the committee structure in the House of Representatives causes vote dilution), *cert. denied*, 464 U.S. 823 (1983); Page v. Dole, No. 93-1546 (JHG), slip op. at 15-16 (D.D.C. Aug. 18, 1994) (discussing how Senate committee structure causes vote dilution).

93. In fact, the equitable discretion doctrine was invoked by the district court as grounds for dismissing the plaintiffs' complaint in *Skaggs*. *See* Skaggs v. Carle, 898 F. Supp. 1, 2 (D.D.C. 1995), *appeal docketed*, No. 95-5323 (D.C. Cir. Sept. 1995).

documented.[94] Commentators take varying positions on which prudential doctrine is best suited to further the constitutional doctrine of separation of powers.[95] This Article takes the position that the political question doctrine is the most appropriate method for courts to invoke for refusing to hear challenges to legislative rules of procedure. This is not to say that standing or ripeness are inappropriate in all situations. In fact, in *Skaggs v. Carle*,[96] ripeness or standing may be the best means for the court to refuse to hear the case on the merits. The doctrine of equitable or remedial discretion, although superficially attractive, is fraught with difficulty and should be abandoned by the District of Columbia Circuit.

A. Standing and Ripeness

Standing and ripeness are distinctly interrelated concepts. Both are derived from the Article III requirement that courts hear only cases or controversies.[97] "In its simplest form, standing identifies *who* may bring claims that some government action

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94. *See generally* Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981); Arthur H. Abel, Note, *The Burger Court's Unified Approach to Standing and Its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187 (1985); Sophia C. Goodman, Note, *Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment*, 40 CASE W. RES. L. REV. 1075 (1989-1990); David G. Mangum, Comment, *Standing Versus Justiciability: Recent Developments in Participatory Suits Brought by Congressional Plaintiffs*, 1982 B.Y.U. L. REV. 371 (1982); Michael Miller, Comment, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341 (1990); Van Tatenhove, *supra* note 11; Jonathan Wagner, Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982).

95. *See, e.g.*, McGowan, *supra* note 94, at 263 (urging courts to retain jurisdiction but adopt the equitable discretion doctrine in congressional plaintiff cases); Abel, *supra* note 94, at 1210 (contending that equitable discretion expands the power of the courts and that the Supreme Court precedent requires standing analysis to be applied in congressional plaintiff cases); Goodman, *supra* note 94, at 1108 (positing that the equitable discretion doctrine gives courts too much power and the injury prong of standing doctrine should be used to deny courts jurisdiction over cases by congressional plaintiffs); Mangum, *supra* note 94, at 386 (supporting the use of the equitable discretion doctrine by the District of Columbia Circuit); Miller, *supra* note 94, at 1374 (asserting that the political question doctrine should not be used to bar cases brought by private voters against legislative rules); Van Tatenhove, *supra* note 11, at 599 (concluding that jurisdictional grounds should be used to bar courts from hearing cases challenging legislative rules of procedure); Wagner, *supra* note 94, at 527 (arguing that the traditional standing doctrine should be applied to suits brought by congressional plaintiffs and that the injury in fact prong of the test should be applied fairly liberally to allow courts to determine the suits).

96. 898 F. Supp. 1 (D.D.C. 1995), *appeal docketed*, No. 95-5323 (D.C. Cir. Sept. 1995).

97. William Lasser, *Standing to Sue*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 819, 819 (Kermit L. Hall et al. eds., 1992).

violates the Constitution. Other justiciability doctrines identify . . . *when* [claims] may be brought (doctrines of mootness and ripeness)."[98] Because of the similarity in analysis between the two doctrines, it is helpful to discuss them together.

1. Standing.— Standing, as articulated by the Supreme Court's recent precedent, *Lujan v. Defenders of the Wildlife*,[99] requires that a plaintiff demonstrate that he has an injury in fact, that his injury be caused by the defendant's actions, and that the court can redress the particular injury.[100] Standing is a requirement under Article III of the Constitution,[101] which allows the judiciary to hear only "cases or controversies."[102] The standing requirement is justified on the ground that the separation of powers requires that the courts not stray beyond their constitutional role of hearing cases or controversies.[103]

When challenging legislative procedure, standing is often one of the most vulnerable aspects of a plaintiff's case. While the district court in *Skaggs v. Carle* did not specifically invoke standing to dismiss the plaintiffs' challenge to House Rule XXI, the court did observe that:

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98. *Id.*

99. 504 U.S. 555 (1992).

100. *Id.* at 560-61. There is actually a fourth element to the standing inquiry, that is, whether the injury is within the zone of interest intended to be protected by the law that the plaintiff claims was violated. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982). Normally, this is not considered as a factor in the standing analysis in congressional plaintiff cases because the "constitutional provisions governing the process of enacting legislation or establishing privileges or duties for one of the houses of Congress have been interpreted to protect the interests of individual members of Congress." Moore v. United States House of Representatives, 733 F.2d 946, 953 (D.C. Cir. 1984).

Judge (now Justice) Scalia took the position when he was on the D.C. Circuit that congressional plaintiffs did not have standing to challenge the method by which legislation was enacted because government officials do not have "a personal 'right' to performance of [their] constitutionally or statutorily assigned role[s]." *Id.* at 960 (Scalia, J., concurring). In other words, government officials' rights to exercise their "authority are not within the 'zone of interests' protected by the provisions of the Constitution and laws conferring such authority." *Id.* While this argument is intriguing, it has not been adopted by any court in analyzing congressional plaintiff cases.

101. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975).

102. U.S. CONST. art. III, § 2.

103. *See* Allen v. Wright, 468 U.S. 737, 752 (1984); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

> Whether expressed in terms of a failure of standing, or "equitable" or "remedial" discretion, the fundamental consideration . . . is one of prudent judicial self-restraint: federal courts should generally refrain, as a matter of policy, from intruding in the name of the Constitution upon the internal affairs of Congress at the behest of lawmakers who have failed to prevail in the political process.[104]

To ensure that courts refrain from deciding cases unless an actual case or controversy is at issue, the Supreme Court has established three factors that must be met in order for a party to have standing.[105] The first element of the standing doctrine requires that the injury in fact be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'"[106] The second element dictates that the injury be "'fairly . . . traceable to the challenged action of the defendant . . . .'"[107] Finally, under the third element, the court must be able to give the plaintiff relief from the allegedly illegal conduct.[108] In a recent application of these elements, the District Court for the District of Columbia in *Page v. Dole*[109] held that the plaintiff challenging the Senate cloture rule did not have standing to sue because he failed to meet all three grounds for establishing standing.[110] Much of the court's reasoning in that case is applicable to *Skaggs*.

With regard to the first element of standing, injury in fact, the *Page* plaintiff relied on two types of injury, only one of which applies to the plaintiffs in *Skaggs*. The first injury the plaintiff in *Page* claimed was that the legislation he supported was not brought to a vote because of the Senate cloture rule.[111] The court acknowledged that the plaintiff presented a fairly specific type of injury.[112] The plaintiffs in *Skaggs*, however, can not prove that any tax legislation that they supported failed because of House

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104. Skaggs v. Carle, 898 F. Supp. 1, 2 (D.D.C. 1995), *appeal docketed*, No. 95-5323 (D.C. Cir. Sept. 1995).

105. Lujan v. Defenders of the Wildlife, 504 U.S. 555, 560-61 (1992).

106. *Id.* at 560.

107. *Id.* at 560-61 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976)).

108. *See id.* at 561.

109. No. 93-1546 (JHG) (D.D.C. Aug. 18, 1994).

110. *Id.* at 17.

111. *Id.* at 8.

112. *Id.*

Rule XXI.[113] Consequently, the *Skaggs* plaintiffs will be forced to rely on the second type of injury described in *Page*. In *Page*, the plaintiff asserted that even though no particular legislation he supported was brought to the Senate for a vote, he incurred an injury because his vote was diluted.[114] The court, however, found this claim "vague, conjectural, and hypothetical."[115] Similar to the plaintiff in *Page*, the plaintiffs in *Skaggs* can point to no "particular bills or proposals that will be the subject of future allegedly unconstitutional [conduct]."[116]

Even if the *Skaggs* plaintiffs could demonstrate that particular tax legislation they supported was approved by a simple majority of the House, but not by a three-fifths majority, it is still unclear whether the plaintiffs would have standing to challenge the House Rule. In order to establish standing, the plaintiffs would have had to prove the final element of the standing doctrine — redressability. Thus, even if the court struck down House Rule XXI and held that tax legislation that had received a simple majority was considered to have passed the House, the legislation might still fail in the Senate or be vetoed by the President. In either case, the court's

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113. *See generally* Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss at 7-13, Skaggs v. Carle, 898 F. Supp. 1 (D.D.C. 1995) [hereinafter Defendant's Reply]. The plaintiffs attempt to rely on the defeat of the Mink Amendment to H.R. 2, *see* 141 CONG. REC. H3742, H3761 (daily ed. Mar. 24, 1995), the only measure considered by the House in which Rule XXI was invoked, to bolster their claim that they have standing. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 11-13, Skaggs v. Carle, 898 F. Supp. 1 (D.D.C. 1995) [hereinafter Plaintiffs' Opposition]. There is absolutely no evidence that this measure would have passed without Rule XXI. In fact, only 20% of the members voted for the measure. *See* Defendant's Reply, *supra*, at 7-13.

The plaintiffs contend that Rule XXI reduced their votes from 44% to 37% of the votes necessary for passage of the legislation. Plaintiffs' Opposition, *supra*, at 12. It is hard to imagine, however, how the plaintiffs suffered a concrete injury by having legislation defeated by a greater margin than it otherwise would have been under majority rule.

Finally, the plaintiffs point to the Tax Fairness and Deficit Reduction Act of 1995, H.R. 1215, 104th Cong., 1st Sess. (1995), as evidence that tax increase legislation has already passed the House with a simply majority vote. Plaintiffs' Opposition, *supra*, at 13. While H.R. 1215 was approved by a vote of 57% in favor to 43% against, *see* 141 CONG. REC. H4318-19 (daily ed. Apr. 5, 1995), the Chairman of the House Rules Committee, Gerald B.H. Solomon, ruled that Rule XXI was not applicable to the bill. *Id.* at H4315-17. In fact, the controversy surrounding this ruling by Chairman Solomon supports the contention that a challenge to Rule XXI is not yet ripe. *See infra* note 134.

114. Page v. Dole, No. 93-1546 (JGH), slip op. at 8 (D.D.C. Aug. 18, 1994).

115. *Id.* at 11.

116. *Id.* The two bills that the plaintiffs in *Skaggs* reference in order to support their contention that they have standing to challenge Rule XXI are inapplicable. *See supra* note 113 (discussing specific legislation in which Rule XXI has been invoked).

action would not cause the legislation that the plaintiffs supported to become law. As a result, the plaintiffs in *Skaggs* could not show that their injury is redressable by the court, thereby failing the final element of standing.

Arguably, even if the plaintiffs are unable to point to particular legislation that failed because of House Rule XXI, the court should still grant standing.[117] In *Vander Jagt v. O'Neill*,[118] the District of Columbia Circuit held that Republican Congressmen who claimed that their voting power had been diluted by under-representation on House committees had suffered sufficient injury to establish standing.[119] Similarly, in *Michel v. Anderson*,[120] private voters claimed that a House Rule, which allowed delegates from territories of the United States to vote in the Committee of the Whole, resulted in the diminution of their votes.[121] The District of Columbia Circuit held that the mere fact that the same injury was suffered by all voters in all states "does not make it an 'abstract' one."[122]

In essence, the plaintiffs in *Skaggs* alleged a similar injury, that is, dilution of their voting power in Congress.[123] Reliance on *Vander Jagt* and *Michel*, however, is misplaced. In *Vander Jagt* and *Michel*, the Congressmen and their constituents suffered a viable injury — the actual diminution of their voting authority — on a day-to-day basis.[124] When a party cannot show either that particular legislation has been defeated because of a legislative rule like Rule XXI, or any other concrete type of injury, the standing

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117. Lieber & Brown, *supra* note 44, at 2352-55 (arguing that courts should grant standing to challenge House Rule XXI).

118. 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

119. *Id.* at 1170.

120. 14 F.3d 623 (D.C. Cir. 1994).

121. *Id.* at 625 (challenging House Rule XII, cl. 2). The Committee of the Whole is "a committee composed of all members of the House through which all public bills affecting revenue and spending proceed, and which shapes, to a very great extent, the final forms of bills that pass the House." *Id.*

122. *Id.* at 626.

123. *See* Complaint, *supra* note 5, para. 31, at 9 (alleging that each Member's voting power on tax increase legislation has fallen from 1/218th to 1/261st of the voting power as a result of House Rule XXI); *cf. Vander Jagt*, 699 F.2d at 1167 (alleging that although Republicans constituted 44.14% of the whole House, they received only 40% of seats on the Budget and Appropriations Committees, only 34.29% of seats on the Ways and Means Committee, and only 31.25% of seats on the Rules Committee).

124. *See Michel*, 14 F.3d at 625; *Vander Jagt*, 699 F.2d at 1170.

doctrine requires that the party resort to a forum other than the judiciary for resolution of his complaint.

While serious separation of powers problems arise when ordinary voters request the judiciary to adjudicate the application of congressional rules of procedure, even more serious concerns are raised when members of Congress seek relief from congressional rules from the judiciary. Therefore, a number of commentators have urged courts to adopt a more rigid standing rule for suits brought by congressional plaintiffs.[125] This more rigid standing analysis attempts to manipulate the injury factor. Under this interpretation of the standing doctrine, "once it is determined that this is a suit by congressmen, pertaining to their respective legislative powers, that is an end of the matter."[126] The problem with an approach to standing that narrows the definition of injury[127] is that it ignores the fact that a "case or controversy" may be established by the plaintiff's suit.[128] This stricter approach to standing "is really making a political question argument in the guise of standing analysis."[129]

2. Ripeness.— The concept of ripeness is another trouble spot for legislators or voters challenging legislative rules that have not yet caused the defeat of legislation. The seminal case analyzing the ripeness doctrine is *Abbott Laboratories v. Gardner.*[130] In *Abbott* the Supreme Court noted that the doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ."[131] In addition, the ripeness doctrine requires that a particu-

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125. *See supra* notes 94-95 (listing articles and comments that take various positions on congressional plaintiff suits).

126. Moore v. United States House of Representatives, 733 F.2d 946, 963 (D.C. Cir. 1984) (Scalia, J., concurring).

127. *Id.*; *Vander Jagt*, 699 F.2d at 1177-85 (Bork, J., concurring).

128. *See* Barnes v. Kline, 759 F.2d 21, 26-27 (D.C. Cir. 1985), *vacated on other grounds sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

> [W]hen a proper dispute arises concerning the respective constitutional functions of the various branches of the government, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). Courts may not avoid resolving genuine cases or controversies — those of a type which are traditionally justiciable — simply because one or both parties are coordinate branches.

Barnes, 759 F.2d at 26-27 (citation omitted).

129. *Moore*, 733 F.2d at 953.

130. 387 U.S. 136 (1967).

131. *Id.* at 148.

lar decision become final "and its effects felt in a concrete way by the challenging parties."[132] In other words, "[d]ismissal for lack of ripeness is appropriate where '[n]othing in the record shows that appellants have suffered any injury thus far, and the law's future effect remains wholly speculative.'"[133]

A challenge to Rule XXI should not be considered ripe until the rule has been successfully invoked to prevent the passage of legislation by a simple majority of the House of Representatives. To consider the issue ripe for judicial determination before that point would be improper because the rule may be rejected by a subsequent Congress before the rule actually prevents the passage of tax legislation that would be approved by a majority.[134] At some point, however, the issue may be ripe for consideration when "the political branches reach a constitutional impasse."[135] Yet even if the issue becomes ripe for adjudication, other issues, such as the justiciability of the matter, must be addressed.

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132. *Id.* at 148-49.

133. Metzenbaum v. Federal Energy Regulatory Comm'n, 675 F.2d 1282, 1290 (D.C. Cir. 1982) (quoting Socialist Labor Party v. Gilligan, 406 U.S. 583, 589 (1972)).

134. *Cf.* Boehner v. Anderson, 30 F.3d 156, 163 (D.C. Cir. 1994) (refusing to address a challenge under the Twenty-seventh Amendment to a quadrennial pay adjustment because Congress may amend the statute to comply with the Constitution before the pay raise takes effect). In fact, the controversy surrounding the application of Rule XXI to H.R. 1215, 104th Cong., 1st Sess. (1995), illustrates that a challenge to the rule is not ripe. A parliamentary inquiry was made as to the application of Rule XXI to H.R. 1215. *See* 141 CONG. REC. H4315 (daily ed. Apr. 5, 1995). While H.R. 1215 was ruled not to be a measure to increase income taxes, *id.*, the scope of Rule XXI remains in question. The House Parliamentarian noted that "'the first essential question yet to be properly determined' is whether the new rule applies discretely to individual provisions of a bill, or instead, to the integrated whole formed by related provision." Lauren Darling, *House Parliamentarian Has Questions About Supermajority Rule for Tax Hikes*, Daily Tax Rep. (BNA) No. 113, at G-6 (June 13, 1995). Moreover, the Chairman of the House Rules Committee observed that "'this is still not a matter which has been fully and finally resolved,' and this is 'an issue on which interpretations, guidelines, policies, and precedents will evolve as the chair is presented with new situations and questions.'" *Id.* at G-7.

135. Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring).

B. Equitable or Remedial Discretion[136]

The doctrine of remedial discretion, as adopted by the District of Columbia Circuit in *Riegle v. Federal Open Market Committee*,[137] has its origins in an article written by then-Chief Judge Carl McGowan of the District of Columbia Circuit.[138] The district court relied upon this doctrine in dismissing the challenge to Rule XXI in *Skaggs v. Carle*.[139] Judge McGowan devised the doctrine because he "found the standing, political question, and ripeness doctrines 'notoriously difficult to understand and to apply, and [failing] in varying degrees to account for the underlying separation-of-powers concerns.'"[140] The court in *Riegle* adopted this rationale[141] and articulated the following test for remedial discretion:

> When a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available *or* a private plaintiff would likely not qualify for standing, the court would be counseled under our standard to hear the case.
>
> . . . We would welcome congressional plaintiff actions involving non-frivolous claims of unconstitutional action which, because they could not be brought by a private plaintiff and are not subject to legislative redress, would go unreviewed unless brought by a legislative plaintiff.[142]

The District of Columbia Circuit distinguished, however, the situation in which legislative action could redress the congressional plaintiff's injury.[143] In that instance, the court recommended judicial restraint, and concluded that private plaintiffs were the

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136. The doctrine was initially called equitable discretion by the District of Columbia Circuit in Riegle v. Federal Open Market Committee, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981), because the parties in that case sought only injunctive relief. *Id.* at 876. The court changed the name of the concept to remedial discretion in Vander Jagt v. O'Neill, 699 F.2d 1166, 1175 n.25 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983), in order to reflect the fact that the parties in that case sought both injunctive and declaratory relief. *Id.* The doctrine will be referred to in this Article as remedial discretion.

137. 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

138. McGowan, *supra* note 94.

139. 898 F. Supp. 1 (D.D.C. 1995), *appeal docketed*, No. 95-5323 (D.C. Cir. Sept. 1995).

140. Gregg v. Barrett, 771 F.2d 539, 543-44 (D.C. Cir. 1985) (quoting McGowan, *supra* note 94, at 244).

141. *Riegle*, 656 F.2d at 878 n.5.

142. *Id.* at 882.

143. *Id.* at 881.

more appropriate parties to challenge legislative actions.[144] Thus, the court determined that in either situation, that is, when private parties may bring an action because legislative redress is available to congressional plaintiffs, or when congressional plaintiffs may bring an action because legislative redress is not available, standing would not raise separation of powers concerns.[145] As a result, the court would be obliged to reach the merits of the claim.[146]

The doctrine of remedial discretion has never been endorsed by the Supreme Court[147] and has been subject to withering attacks.[148] The fundamental flaw in the doctrine of remedial discretion is the assumption that all constitutional violations must be subject to judicial remedy.[149] The Supreme Court has rejected the notion that all constitutional violations ultimately must be resolved by the judiciary:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to

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144. *Id.*

145. *Id.* at 881, 882.

146. *Riegle*, 656 F.2d at 881, 882.

147. Humphrey v. Baker, 848 F.2d 211, 214 (D.C. Cir. 1988) ("We are fully mindful, however, that this circuit's recently minted doctrine of equitable discretion has not even been addressed, much less endorsed, by the Supreme Court.").

148. *See* Barnes v. Kline, 759 F.2d 21, 61 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated on other grounds sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

> At bottom, equitable discretion is a lawless doctrine that is the antithesis of the "principled decisionmaking" that was invoked to justify its manufacture. A doctrine of remedial discretion more than "suggests the sort of rudderless adjudication that courts strive to avoid," — it is rudderless adjudication.
>
> . . . .
>
> Ultimately, the doctrine of equitable discretion makes cases turn on nothing more than the sensitivity of a particular trio of judges.

Barnes, 759 F.2d at 61; *see also* Moore v. United States House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) (contending that standing doctrine is distorted by the "ad-hoc ery of 'remedial discretion'"). "The chancellor's foot has never been considered a particularly satisfactory unit of measure, even for matters of relatively small public consequence. It is regrettable to see it applied, now for the fourth time in a panel opinion of this court . . . ." *Moore*, 733 F.2d at 956 (Scalia, J. concurring).

149. *See Riegle*, 656 F.2d at 882 (contending that "there are no prudential considerations or separation-of-powers concerns which would outweigh the mandate of the federal courts to 'say what the law is'" when "non-frivolous claims of unconstitutional action . . . would go unreviewed unless brought by a legislative plaintiff").

the surveillance of Congress, and ultimately to the political process.[150]

Furthermore, despite the District of Columbia Circuit's claims that the prudential doctrines of ripeness, standing, and political question are insufficient to address separation of powers concerns,[151] the genesis of the remedial discretion doctrine boils down to the judiciary's reluctance to relinquish its power to the other coequal branches of government. It is entirely unclear why ripeness, standing, and the political question doctrine are not "sufficiently catholic in formulation or flexible in application to resolve the prudential issues arising in congressional plaintiff cases."[152] In fact, the political question doctrine, with its six factors,[153] is extremely catholic in formulation. The crux of the problem appears to be that the political question doctrine is not flexible because it prohibits courts from deciding particular cases involving the political process. In other words, the remedial discretion doctrine reflects the unwillingness of the District of Columbia Circuit to relinquish its ability to adjudicate a class of cases, while standing and the political question doctrine require that the court forego all authority to hear such cases.[154]

A major problem with both standing and the doctrine of remedial discretion is the issue of private plaintiffs — as opposed to congressional plaintiffs suing in their official capacity for injury to their official authority.[155] In *Riegle*, the District of Columbia Circuit drew a sharp distinction between congressional and private plaintiffs.[156] The court noted that "no distinctions are to be made

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150. United States v. Richardson, 418 U.S. 166, 179 (1974).

151. *Riegle*, 656 F.2d at 880, 881.

152. *Id.* at 881.

153. *See infra* text accompanying note 188.

154. *Vander Jagt*, 699 F.2d at 1184 (Bork, J., concurring).

> Political question, like standing, is a doctrine that raises a jurisdictional bar to judicial power, while remedial discretion . . . raises no bar and grants the judiciary unfettered discretion to hear a case or not, depending on the attractiveness of the idea.
>
> My colleagues' disinclination to rest this case upon a jurisdictional ground — whether that of standing or political question — rests squarely upon the erroneous notion, expressed in *Riegle* and reiterated today, that there must be judicial power in all cases and that doctrines must not be adopted which might frustrate that power.

Id.

155. *Id.* at 1183 (Bork, J., concurring).

156. *Riegle*, 656 F.2d at 877, 878.

between congressional and private plaintiffs in the standing analysis."[157] Nonetheless, the court drew a distinction between congressional plaintiffs and private plaintiffs by requiring the former to seek remedy from their colleagues, while allowing the latter to go directly to the courts.[158] The rationale the court gave for this distinction was the conclusory statement that "a private plaintiff's suit would not raise separation-of-powers concerns . . . ."[159] However, Judge Bork's concurrence in *Vander Jagt*,[160] his dissent in *Barnes v. Kline*,[161] and Judge (now Justice) Scalia's concurrence in *Moore v. United States House of Representatives*[162] adequately demonstrate that "a private plaintiff's suit raises identical separation-of-powers concerns because those concerns are about the relationship of the courts to Congress . . . ."[163]

In *Skaggs v. Carle*,[164] the district court dismissed the suit brought by the private plaintiffs challenging House Rule XXI, claiming that

> [t]he voters' claim here is entirely derivative . . . . To allow the presence of token voter-plaintiffs to sustain an action such as this, and *a fortiori* to allow the Member-plaintiffs to invoke their own status as voters to the same end, is an all-too-facile expedient to circumvent the doctrine of equitable discretion, and to subvert altogether the holdings of the line of discretionary abstention cases . . . .[165]

This derivative-claim approach to private plaintiff suits only highlights "the *ad-hoc* ery of 'remedial discretion.'"[166] This approach also undermines a significant prong of the remedial discretion test first enunciated in *Riegle*. In that case, the court noted that "[t]here is no general requirement that a private litigant employ self-help before seeking judicial relief. Nor should there be, because an ordinary plaintiff, having suffered an injury in fact

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157. *Id.* at 877.
158. *Id.* at 881.
159. *Id.*
160. *See Vander Jagt*, 699 F.2d at 1177-85.
161. 759 F.2d 21, 41-71 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated on other grounds sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).
162. 733 F.2d 946, 956-65 (D.C. Cir. 1984) (Scalia, J., concurring).
163. *Vander Jagt*, 699 F.2d at 1184.
164. 898 F. Supp. 1 (D.D.C. 1995), *appeal docketed*, No. 95-5323 (D.C. Cir. Sept. 1995).
165. *Id.* at 12.
166. *Moore*, 733 F.2d at 959 (Scalia, J., concurring).

within the contemplation of the law he invokes, is entitled to his day in court."[167]

In two subsequent cases the District of Columbia Circuit rejected the private plaintiff requirement proffered in *Riegle*.[168] The court modified the remedial discretion doctrine, stating that "if a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action."[169] Moreover, the court noted that the prong of the *Riegle* test for remedial discretion dealing with private plaintiffs was flawed:

> [T]here is a more fundamental difficulty with *Reigle's* non-binding observations about the role of private plaintiffs. Specifically, the separation-of-powers concerns informing the doctrine of equitable discretion are, upon reflection, entirely unaffected by the ability of a private plaintiff to bring suit. As *Riegle* itself recognized, those concerns are implicated by the judiciary's resolution of issues that are appropriately left to the legislative arena. The ability (or not) of a private plaintiff to sue implicates an entirely distinct matter — the role of the federal courts in adjudicating non-frivolous claims of constitutional violations.[170]

The District of Columbia Circuit again shifted positions on the issue of private plaintiffs, however, when it undertook to decide the merits of a challenge to the internal procedure of the legislature.[171] The court illustrated the absolute power retained by the judiciary under the remedial discretion doctrine in *Michel v. Anderson* when it held: "It appears to us, however, that it is unnecessary to struggle with the [remedial discretion] doctrine since, however construed, it has no applicability to private voters. . . . The remedial discretion doctrine, therefore, cannot be employed to bar a private citizen's claim over which we have jurisdiction."[172] This type of vacillating on a key factor of the doctrine as enunciated in *Riegle* demonstrates the weakness of the concept. More importantly, several panels of the District of

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167. *Riegle*, 656 F.2d at 878 (quoting McGowan, *supra* note 94).

168. Humphrey v. Baker, 848 F.2d 211, 214 (D.C. Cir. 1988); Melcher v. Federal Open Mkt. Comm., 836 F.2d 561, 564 (D.C. Cir. 1987).

169. *Melcher*, 836 F.2d at 565.

170. *Id.* at 564.

171. Michel v. Anderson, 14 F.3d 623, 628 (D.C. Cir. 1994).

172. *Id.*

Columbia Circuit have specifically urged that the District of Columbia Circuit en banc or the Supreme Court reject the doctrine:[173]

> Several members of this court have previously expressed concern over whether equitable discretion represents a "viable doctrine upon which to determine the fate of constitutional litigation." Those concerns, which all members of this panel share, continue to trouble us. As a panel, however, we are of course bound faithfully to follow and apply the law of our circuit.[174]

The prudential doctrines discussed above are "founded in concern about the proper — and properly limited — role of the courts in a democratic society."[175] While separation of powers limitations on the role of the judiciary are important in standing,[176] ripeness,[177] and remedial discretion[178] analysis, the political question doctrine addresses all of the separation of powers considerations raised by a suit challenging legislative rules of procedure without the limitations of the doctrines previously discussed.

C. The Political Question Doctrine

> "Courts and commentators have long recognized that it is crucial to distinguish questions about whether judicial power exists, from questions about whether judicial power should be exercised."[179]

In addition to the concepts of ripeness and standing, the political question doctrine has been developed by the Supreme Court in order to prohibit the judiciary from meddling in matters that courts are not competent to decide. The doctrine was first utilized in *Luther v. Borden*.[180] Chief Justice Taney, writing for

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173. *Humphrey*, 848 F.2d at 214; *Melcher*, 836 F.2d at 565 n.4.

174. *Humphrey*, 848 F.2d at 214 (quoting *Melcher*, 836 F.2d at 565 & n.4).

175. Warth v. Seldin, 422 U.S. 490, 498 (1975).

176. *See Vander Jagt*, 699 F.2d at 1179 (Bork, J., concurring); Van Tatenhove, *supra* note 11, at 624.

177. Reno v. Catholic Social Services, Inc., 113 S. Ct. 2485, 2495 n.18 (1993) ("We have noted that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.").

178. *See* Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir. 1981).

179. *Vander Jagt*, 699 F.2d at 1170 (Bork, J., concurring).

180. 48 U.S. (7 How.) 1 (1849).

the Court, refused to consider whether a particular government established in Rhode Island during the Dorr Rebellion met the requirements of the Guaranty Clause of the Constitution.[181] Although the doctrine has been applied relatively infrequently by the Supreme Court in refusing to decide the merits of a case,[182] the doctrine remains a viable method of restraining judicial power.[183] The Supreme Court recently gave resounding approval to the doctrine in *Nixon v. United States*.[184] In that case the Court held that the power to try impeachments was textually committed to the Senate, and the judiciary had no power to interfere with the method by which the Senate conducted impeachment trials.[185] Justice Souter, concurring in judgment, wrote:

> Whatever considerations feature most prominently in a particular case, the political question doctrine is essentially a function of the separation of powers, . . . existing to restrain courts from "inappropriate interference in the business of the other branches of Government," . . . and deriving in large part from prudential concerns about the respect we owe the political departments.[186]

In *Baker v. Carr*[187] the Supreme Court set forth six factors that a court should consider in determining whether it should refrain from hearing a case, even if the plaintiffs have standing: (1) "a textually demonstrable constitutional commitment of the issue [to a] coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving [the case]"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of

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181. U.S. CONST. art. IV, § 4; *see* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849). *See generally* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 102-04 (1988).

182. Mulhern, *supra* note 181, at 102-08.

183. *But see* Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303 (1996) (arguing that standing has superseded the political question doctrine as the appropriate method of dealing with separation of powers issues).

184. 506 U.S. 224 (1993).

185. *Id.*

186. *Id.* at 252-53 (Souter, J., concurring) (quoting United States v. Munoz-Flores, 495 U.S. 385, 394 (1990)).

187. 369 U.S. 186 (1962).

government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[188] When a court is presented with a case alleging a generalized injury, the court should consider deciding the case on prudential grounds rather than under Article III.[189] In any case, the factors laid out in *Baker v. Carr* counsel courts to exercise restraint and avoid "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government . . . ."[190]

1. Textually Demonstrable Constitutional Commitment to a Coordinate Political Department.— This Article does not contend that legislative rules of procedure are always beyond judicial review. The Supreme Court established more than 100 years ago in *United States v. Ballin*[191] that legislative rules in some situations are subject to judicial review for their constitutionality.[192] To say that the judiciary may review legislative rules in certain instances is not to say, however, that such review is appropriate in all instances.[193] The question should not be whether legislative rules generally are above judicial scrutiny, but whether the legislative rule in question is beyond the competence of the federal judiciary.[194]

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188. *Id.* at 217.

189. *See* Van Tatenhove, *supra* note 11, at 624-25 n.139 (citing David A. Logan, *Standing To Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 42 (1984)). *But cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-78 (1992) (asserting that Article III standing limits the ability of Congress to allow suits based on broad, generalized injuries (i.e., citizen suits)).

> We have consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy.

Id. at 573-74.

190. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) (quoting United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J. concurring)).

191. 144 U.S. 1 (1892).

192. *See id.* at 5 (recognizing that Congress "may not by its rules ignore constitutional restraints or violate fundamental rights . . . .").

193. *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1170 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

194. *See* Metzenbaum v. Federal Regulatory Comm'n, 675 F.2d 1282, 1287 (D.C. Cir. 1982). In *Metzenbaum* the court held that Article I, Section 5, Clause 2, of the Constitution

A distinction should be drawn between those rules that affect only the internal operations of Congress, that is, the method by which legislation is enacted, and legislative rules that affect persons other than members of Congress.[195] While adoption of the former is textually committed to Congress, the latter is usually the proper subject of judicial review.[196] The Court has not hesitated to actively police legislative rules that implicate the rights of individual citizens outside of the legislative process. In *United States v. Smith*[197] the Court explicitly recognized the distinction between rules that affect only the internal operations of the Senate and rules that have an impact on individuals outside of Congress.[198] *Smith* involved a Senate rule that allowed the Senate to reconsider a confirmation after it had approved the President's nomination to federal office.[199] The Court reasoned that it had the power to review the Senate rule, stating, "As the construction to be given to the rules *affects persons other than members of the Senate*, the question presented is of necessity a judicial one."[200]

The Court reached a similar result in *Christoffel v. United States*.[201] In that case, the Court examined the House rules and determined that the House had violated its own rules of operation, thereby denying the defendant due process and leading to the defendant's conviction for perjury.[202] The Court was careful,

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committed to Congress the power to determine the rules of its own internal proceedings, even though in certain instances the legislative rules may be subject to judicial review. *Id.*

195. *See id.*

196. *See id.* In some situations even legislative rules that affect persons other than members of Congress are not subject to judicial review. In Nixon v. United States, 506 U.S. 224 (1993), the Supreme Court held that legislative rules governing the manner of trying impeachments before the Senate was a nonjusticiable political question because the Constitution gave the Senate the *sole* power to try impeachments. *See id.* at 232-34.

197. 286 U.S. 6 (1932).

198. *Id.* at 33.

199. *Id.* at 30 (interpreting Senate Rules XXXVIII and XXXIX).

200. *Id.* at 33 (emphasis added).

201. 338 U.S. 84 (1949).

202. *Id.* at 90. In *Christoffel* the defendant appeared before a House committee to answer to an allegation that he was a Communist. *Id.* at 85. At the beginning of the committee session, a quorum of the committee members were present. *Id.* at 86. The defendant contended that during the course of the hearing, and in particular when he was alleged to have made his perjurious statements to the committee, less than a quorum of committee members were present. *Id.* at 87. Presence of a quorum was an indispensable part of the offense. *Id.* The Court was faced with the question of whether a quorum was sufficient at the time the committee convened or whether a quorum had to be physically present at the time the offense was committed. *Id.* at 90. The Court held that the absence of a quorum at the time the statements were made not only violated Congress's own rules

however, to distinguish between its power to review congressional rules when the rights of an individual are at stake and its power generally to supervise rules of congressional proceedings. The Court observed that "[c]ongressional practice in the transaction of ordinary legislative business is of course *none of our concern* . . . ."[203]

The conclusion that Article I, Section 5 commits to Congress alone the power to determine its internal rules of procedure is reinforced by the lack of judicially manageable standards for deciding majority rule cases. As the Court in *Nixon v. United States*[204] observed:

> [T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.[205]

2. Lack of Judicially Discoverable and Manageable Standards.— If the judiciary were to strike down House Rule XXI, it would never be able to extricate itself from the task of determining when a legislative rule violates the majority rule principle. To allow members of Congress, or even individual voters, to challenge legislative rules may have the effect of turning the principle of majority rule upon itself and allowing the minority truly to tyrannize the majority. After the legislature has "given its sanction to legislation, and implicitly the process followed in its enactment, a minority might yet frustrate its implementation through litigation

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but also violated the defendant's due process right to receive a trial on every element of the offense charged against him. *Id.*

203. *Id.* at 88 (emphasis added); *see also* Yellin v. United States, 374 U.S. 109, 143 (1963) (White, Clark, Harlan, Stewart, JJ., dissenting).

> Article I, section 5, cl. 2, of the Constitution provides that "Each House may determine the Rules of its Proceedings." The role that the courts play in adjudicating questions involving the rules of either house must of necessity be a limited one, for the manner in which a house or committee of Congress chooses to run its business ordinarily raises no justiciable controversy. However, *when the application or construction of a rule directly affects persons other than members of the house, "the question presented is of necessity a judicial one."*

Id. (citations omitted) (emphasis added).

204. 506 U.S. 224 (1993).

205. *Id.* at 228.

based on purported violations of 'housekeeping' rules."[206] This is a particular danger when so many of the legislative rules that help facilitate the orderly consideration of legislation have antimajoritarian effects. Strong antimajoritarian tendencies exist in the committee structures of both the House and the Senate;[207] in House Rule XXVII, requiring two-thirds of the House to concur in order to suspend the rules and pass legislation;[208] in the House discharge rule, requiring an absolute majority of 218 members to force a committee to discharge legislation;[209] and in the rules regarding filibuster and cloture in the Senate.[210] To some degree, each of these rules may be distinguished from House Rule XXI on the ground that they affect the intermediate stages of legislation; Rule XXI, however, affects final passage.[211] Nevertheless, if the courts agree to hear challenges to Rule XXI, they will be asked repeatedly by individuals or legislators who are unhappy with the disposition of legislation to set aside that outcome so that they can get a second chance to obtain the result they seek. This is the very danger that the political question doctrine was designed to avoid. As Judge Bork observed:

> Courts do not understand — indeed, probably not all legislators understand — how the various rules, customs, and practices of the legislature interact and how changing one aspect could produce the most unexpected distortions of the legislative process elsewhere. Nor can I imagine that extensive trials would educate courts to become experts on legislative processes

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206. Metzenbaum v. Federal Regulatory Comm'n, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

207. *See* Page v. Dole, No. 93-1546 (JHG), slip op. at 15-16 (D.D.C. Aug. 18, 1994) (discussing how Senate committee structure causes vote dilution).

208. House Rule XXVII, 104th Cong., 1st Sess. (1995).

209. House Rule XXVII(3), 104th Cong., 1st Sess. (1995).

210. Senate Rule XXII.

211. The distinction between final passage and intermediate stages in the political process is an insufficient basis for distinguishing Rule XXI from other legislative rules that have supermajority properties because it is difficult, if not impossible, to determine which rules effect final outcome and which are only intermediate rules. Cloture provides an excellent example. If the Senate can obtain cloture and cut off debate, the bill may pass by a simple majority. It is impossible, however, for the bill to pass by a simple majority if sixty percent of the quorum cannot agree to cut off debate. Therefore, cloture effectively affects final passage of legislation. *See generally* Howard H. Baker, *Rule XXII: Don't Kill It*, WASH. POST, Apr. 27, 1993, at A17; Lloyd Cutler, *On Killing Senate Rule XXII (Cont'd)*, WASH. POST, May 3, 1993, at A19; Lloyd Cutler, *The Way To Kill Senate Rule XXII*, WASH. POST, Apr. 19, 1993, at A23; Thomas Geoghegan, *In the Senate, the Dole Filibuster Busts the Designs of the Founding Fathers*, WASH. POST, Sept. 4, 1994, at C1; George F. Will, *The Framers' Intent*, WASH. POST, Apr. 25, 1993, at C7.

> so that they could improve those processes. The task, if there is a task that needs doing, is one for political reform by those intimately familiar with the complex arrangements and interactions involved.[212]

In *Vander Jagt v. O'Neill*,[213] the District of Columbia Circuit illustrated the danger of the judicial branch interfering with rules that govern the structure of Congress. In *Vander Jagt* the court was faced with a challenge to the allocation of members of the House to committee seats.[214] In particular, the plaintiffs, Republican representatives and their constituents, alleged that their representation in the House as a whole did not accurately reflect their representation on particular committees.[215] Although the court invoked the doctrine of remedial discretion, it recognized that to give plaintiffs relief would not reflect the respect for a coordinate branch of government that the doctrine of separation of powers requires.[216] The court did not refuse to grant relief because it could not fashion a remedy; rather, the court felt that fashioning a remedy would require nearly constant judicial supervision of Congress.[217] The District of Columbia Circuit found this notion "'startlingly unattractive' . . . , given our respect for a coequal branch of government . . . ."[218]

Judge Bork's concurrence, although based on standing grounds rather than remedial discretion or the political question doctrine, demonstrates even more clearly the dangers of allowing the judiciary to police the internal rules of Congress:[219]

> Appellants' complaint invites federal courts to participate extensively in the internal processes of Congress. We should decline the invitation because of the consequences of accepting it. If an allegation of a diminution of influence on the legislative process were sufficient to confer standing, federal courts doubtless

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212. Vander Jagt v. O'Neill, 699 F.2d 1166, 1182 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

213. *Id.*

214. *Id.* at 1167.

215. *Id.* (alleging that although Republicans constituted 44.14% of the whole House, they received only 40% of the seats on the Budget and Appropriations Committees, 34.29% of seats on the Ways and Means Committee, and 31.25% of the seats on the Rules Committee).

216. *Id.* at 1175-76.

217. *Id.* at 1176, 1177 n.27.

218. *Vander Jagt*, 699 F.2d. at 1176 (quoting Davids v. Akers, 549 F.2d 120, 123 (9th Cir. 1977)).

219. *See id.* at 1177 (Bork, J., concurring).

> would be invited to rule upon the ways in which committee and subcommittee members are chosen, since party lines aside, it is clear that those chosen for committees on the budget or foreign affairs or rules generally have more influence than those not so chosen. Perhaps we could be called upon to rule on filibusters, since those who filibuster may have disproportionate influence over legislative outcomes. *Courts might be asked to control the order in which legislation is brought to the floor, debated, and voted on.* Surely we would be requested to remedy disproportionate assignments of staff as between committee majorities and minorities, for those assignments affect influence on the legislative process. Examples of this sort could be multiplied, but perhaps enough has been said to indicate why federal courts should firmly refuse to enter upon the wholly inappropriate task of ensuring absolute equity in Congress's legislative procedures. It is absurd to think that courts should purge the political branches of politics.[220]

While the opinion of Judge Bork may be characterized merely as a parade of horribles,[221] his characterization of the dangers of reviewing legislative rules of procedure is not so far-fetched. The United States District Court for the District of Columbia has already been presented with a challenge to the filibuster.[222] *Skaggs v. Carle*[223] offers the judiciary another opportunity to impose its view of proper procedure on Congress. In addition, House Rule XXVII, requiring two-thirds of the House to concur in order to suspend its rules and pass legislation,[224] presents issues similar to those in *Skaggs*. The House discharge rule,[225] requiring an absolute majority of 218 members to force a committee to discharge legislation, could be challenged on a somewhat different, although analogous, ground. Potential plaintiffs, who were not able to get legislation that they favored discharged from committee, could allege that the requirement of an absolute majority for

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220. *Id.* at 1181 (emphasis added).

221. *Cf. id.* at 1176 (noting that "in an extensive discussion (that gives new meaning to the phrase 'parade of horribles'), *Davids* spelled out how disastrously intrusive it would be if we were to accept appellant's invitation to restructure congressional committees") (citing Davids v. Akers, 549 F.2d 120, 124-25 (9th Cir. 1977)).

222. *See* Page v. Dole, No. 93-1546 (JHG) (D.D.C. Aug. 18, 1994); *see also supra* notes 109-16 and accompanying text (discussing *Page* decision).

223. 898 F. Supp. 1 (D.D.C. 1995), *appeal docketed*, No. 95-5323 (D.C. Cir. Sept. 1995).

224. House Rule XXVII, 104th Cong., 1st Sess. (1995).

225. House Rule XXVII(3), 104th Cong., 1st Sess. (1995).

discharge violates the Constitution's requirement that "a Majority of each [House] shall constitute a Quorum to do Business."[226]

Finally, as Judge Bork pointed out, "there are more than considerations of comity and respect here, more than historical tradition and the constitutional need to retain limits on judicial power."[227] More fundamentally, courts do not have the competence to determine the appropriate interplay of legislative rules: "There is the very real problem of a lack of judicial competence to arrange complex, organic, political processes within a legislature so that they work better."[228] Judge Bork goes on to observe that,

> "The institutions of a secular, democratic government do not generally advertise themselves as mysteries. But they are. What they do, how they do it, or why it is necessary to do what they do is not always outwardly apparent. Their actual operation must be assessed, often in sheer wonder, before they are tinkered with, lest great expectations be not only defeated, but mocked by the achievement of their very antithesis."[229]

For these reasons, the courts should refrain from reviewing legislative rules that do not impose direct and particularized injury on individual plaintiffs. To say, however, that

> a particular rule falls within the set of those questions effectively outside the reach of the judiciary does not necessarily require the conclusion that the rule is above scrutiny for constitutional compliance.[230]
>
> [W]e have to divest ourselves of the common misconception that constitutionality is discussable or determinable only in the courts, and that anything is constitutional which a court cannot or will not overturn. We ought to understand, as most senators and congressmen understand, that Congress's responsibility to preserve the forms and the precepts of the Constitution is greater, rather than less, when the judicial forum in unavailable, as it sometimes must be.[231]

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226. U.S. CONST. art. I, § 5, cl. 1.

227. Vander Jagt v. O'Neill, 699 F.2d 1166, 1182 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

228. *Id.*

229. *Id.* (quoting ALEXANDER M. BICKEL, REFORM AND CONTINUITY 2 (1971)).

230. Van Tatenhove, *supra* note 11, at 626.

231. *Id.* at 626-27 n.145 (quoting C. BLACK, IMPEACHMENT: A HANDBOOK 23-24 (1974)); *see also* John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 371-400 (1988).

IV. Conclusion

It appears that the Framers of the Constitution contemplated that a majority of representatives should control all decisions of the House, except when the Framers felt that special protection was required. House Rule XXI offends this principle of majority rule because it allows forty-one percent of the representatives to prevent legislation or extract disproportionate concessions for their votes. Yet, despite this apparent constitutional violation, congressmen and voters must seek their relief in the legislature and not the courts. To allow the courts to review this type of claim would open an entire gambit of legislative rules of procedure to judicial scrutiny: "[I]t is, of course, precisely the function of the Article III limitations on jurisdiction, through such doctrines as standing and political question, to ensure that nonfrivolous claims of unconstitutional action will go unreviewed by a court."[232]

While *United States v. Ballin*[233] and other cases recognize that not all legislative rules are shielded from judicial scrutiny, cases subsequent to *Ballin* tend to support the conclusion that only when an individual person has a particular injury caused by a legislative rule can the courts intervene. The plaintiffs challenging House Rule XXI fail to meet this requirement. Even if the plaintiffs are able to show that the tax legislation, which they support, failed to pass the House because of Rule XXI, their claim is insufficient to invoke review by the courts. It involves an attack on the legislative process and not a claim of injury to a private individual.

Article I, Section 5, Clause 2 established a scheme by which each house of Congress could determine its internal rules of procedure without involving the other house or the President.[234] If the rulemaking clause

> had granted to the executive or the judiciary the authority to impose procedural rules on Congress, it would have created not a check on power but rather a control of one branch by another. A similar spectre is presented by allowing an assertion

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232. Vander Jagt v. O'Neill, 699 F.2d 1166, 1183 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

233. 144 U.S. 1 (1892).

234. Normally legislation must go through bicameralism and presentment. *See* U.S. CONST. art. I, § 7 (establishing procedure for bills to become law).

> of power by the judiciary, limited only by self-restraint, to impose its interpretation of those rules on Congress.[235]

This is the very danger that the doctrine of separation of powers, as applied through standing and the political question doctrine, is intended to prevent.

235. Van Tatenhove, *supra* note 11, at 627.